

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 15, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Destiladora del Valle de Tequila SA de CV
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Serial No. 90269534
—

Francis J. Ciaramella of Francis John Ciaramella, PLLC,
for Destiladora del Valle de Tequila SA de CV.

David I, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

—
Before Lykos, Goodman, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Destiladora del Valle de Tequila SA de CV (“Applicant”) seeks registration on the Principal Register of the mark DESPERADOS (in standard characters) for “Distilled agave liquor; Distilled blue agave liquor,” in International Class 33.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied

¹ Application Serial No. 90269534 was filed on October 21, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

to the agave liquor goods identified in the application, so resembles the following two DESPERADOS marks owned by the same registrant:



2

and



3

each for “Beers,” in International Class 32, on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

² Registration No. 5871652, issued October 1, 2019. The registration contains the following description of the mark and color claim: “The mark consists of a three[-]dimensional configuration of a bottle which has the word ‘DESPERADOS’ pressed into the glass on the sides thereof within a partial oblong design pressed into the glass and which displays the word ‘DESPERADOS’ in red letters outlined with white on the mid-section and the neck of the bottle, and a green frame or border on the mid-section of the bottle. The broken lines depicting the shape of the bottle indicate placement of the mark and are not part of the mark.” “The color(s) red, white, and green is/are claimed as a feature of the mark.” For convenience, we refer to this mark as the “bottle-placement mark.”

³ Registration No. 6458340, issued August 24, 2021. The registration contains the following description of the mark and color claim: “The mark consists of the term ‘DESPERADOS’ in stylized red and black lettering with three overlapping red and black coins above the center of the wording. The wording and coins appear on a white background that is outlined by a black border. The center coin contains a cactus plant in black on a red background with a black border and black shading surrounding the cactus. The left coin contains three circles in black on a red background with a black border and black shading surrounding the circles. The right coin contains a stylized plant in black on a red background with a black border and black shading surrounding the plant.” “The color(s) black, red, and white is/are claimed as a feature of the mark.” For convenience, we refer to this mark as the “coin mark.”

After the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, the appeal was resumed, and Applicant and the Examining Attorney filed appeal briefs. For the reasons discussed below, we affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d).

Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*,” setting forth factors to be considered and referred to as “*DuPont* factors”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to the *DuPont* factors depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). In any likelihood of confusion analysis, two

key considerations are the similarities between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”)

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect registrants from damage caused by registration of similar marks likely to cause such confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, considering their appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Inn at St. John’s, LLC*, 126 USPQ2d at 1746; *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156

USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). Further, the marks must be considered in light of the fallibility of memory. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992)); *see also In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just a portion thereof. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). “No element of a mark is ignored simply because it is less dominant, or

would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *See Stone Lion*, 110 USPQ2d at 1164.

Applicant’s mark is the word DESPERADOS in standard characters. Registrant’s bottle-placement and coin marks are also comprised, in part, of the word DESPERADOS which is the only literal element of the cited marks. As the Examining Attorney contends, “[A]pplicant’s mark is identical to the literal element of both of the cited registered marks.”⁴ Applicant does not argue otherwise. To the extent that Applicant’s mark and Registrant’s marks each contain the word DESPERADOS, we find the marks to be similar in sound.

Applicant argues that its mark differs from Registrant’s marks in appearance and commercial impression because “both . . . Applicant and [Registrant] present their respective marks using distinct logos or fonts” which create “particular and distinct commercial impression[s].”⁵ Applicant contends that the design elements of Registrant’s marks are “the dominant portion of the [cited] marks” because they are “substantially larger than [the DESPERADOS] word element[.]” and it would be

⁴ 8 TTABVUE 4. Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution record refer to the .pdf version of the TSDR system. *See, e.g., In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *1 n.1 (TTAB 2023).

⁵ 6 TTABVUE 5.

“inappropriate to compare Applicant’s mark to the [cited m]arks merely upon the shared synonymous use of the wording DESPERADOS.”⁶

Because the rights associated with a standard character mark reside in the wording, not in any particular display, Applicant’s standard-character mark “may be presented in any font style, size or color, including the same font, size and color as the literal portions of [Registrant’s] mark[s].” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012) (rejecting argument that an applicant’s mark presented in standard characters renders it visually different from the distinctive design and color elements of cited mark); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that an applicant’s standard character mark was distinct from a mark registered in stylized lettering with a design; “[b]y presenting its mark merely in a [standard characters], a *difference* cannot legally be asserted by that party.” (emphasis original)). We thus must assume that Applicant’s DESPERADOS mark could be displayed in the same font, colors, and word size as the DESPERADOS elements of Registrant’s marks. In view thereof, the marks are similar in appearance to the extent they each contain the same word DESPERADOS.

“In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which

⁶ 6 TTABVUE 7.

it is affixed.” *In re Viterra*, 101 USPQ2d at 1908 (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine*, 126 USPQ2d at 1184 (“In the case of marks, such as [Registrant’s], consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.”). We find this to be the case in the current appeal, where DESPERADOS is presented in the cited coin mark with large, all-capital, red letters against a white background within a black carrier, and is the largest distinctive element of that mark. The tree coins are smaller and not as significant in making a commercial impression.⁷ Because the letters of the word DESPERADOS reduce in size from left to right, the eye is immediately drawn to and across the DESPERADOS element of the coin mark. Similarly, the cited bottle-placement mark presents DESPERADOS thrice – once pressed into the side of the bottle, a second time in red letters on the mid-section of the bottle, and third time in red letters on the neck of the bottle.⁸

We do not ignore other elements of the cited marks, and we evaluate the marks in their entireties. However, we find the DESPERADOS portion of the cited marks to

⁷ While the coins are less significant, we do not ignore them; we consider the mark as whole. The central, largest coin contains what is described as “a cactus plant” and which resembles an agave (i.e., the plant from which Applicant’s goods are made).

⁸ Applicant’s argument that the bottle-placement mark “is for a stylized bottle design,” 6 TTABVUE 5, is incorrect. As the Examining Attorney observes, “[t]he description of the cited registration clearly states that the [shape of the] bottle is not claimed as a feature of the mark and that the bottle . . . is merely shown in broken lines to indicate the placement of the mark.” 8 TTABVUE 5.

be the dominant portion most “likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine*, 126 USPQ2d at 1184. To the extent Applicant’s mark and Registrant’s marks each contain the word DESPERADOS, we find the marks present a similar commercial impression.

While Applicant correctly argues that the meaning or connotation of a mark must be determined in relation to the identified goods,⁹ *see, e.g., In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1632 (TTAB 2018) (considering the meaning of the mark to customers of the identified goods), Applicant fails to assert what it believes the connotation of each mark might be and how it differs from mark to mark. In the context of the alcoholic beverages identified in the application and cited registrations, and in the absence of any evidence to the contrary, the word DESPERADOS would have the same meaning in each mark.¹⁰ *See In re Embiid*, 2021 USPQ2d 577, at *21 (“[T]here is no evidence here, or other reason to find, that the mark TRUST THE PROCESS has one meaning when used with shoes, and a second and different meaning when used with shirts and sweatshirts, based on the nature of the respective goods.”). *But cf. In re Sears, Roebuck and Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987)

⁹ 6 TTABVUE 4.

¹⁰ As the Examining Attorney indicated in the first Office action (informing Applicant that the translation of the mark provided in the original application was unnecessary and would not be printed on the prospective registration), “desperados” appears in English dictionaries. March 26, 2021 Office Action at 4. “Desperado” means “a bold or violent criminal *especially* : a bandit of the western U.S. in the 19th century.” MERRIAM-WEBSTER DICTIONARY ([merriam-webster.com/dictionary/desperado](https://www.merriam-webster.com/dictionary/desperado)), accessed September 13, 2023.

(CROSS-OVER applied to bras has different meaning than CROSSOVER applied to ladies' sportswear).

We find that when considered in their entirety Applicant's mark DESPERADOS and the cited marks are similar in appearance, sound, connotation, and commercial impression. Accordingly, the first *DuPont* factor strongly favors finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Trade Channels

The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods as described in an application or registration, and the third *DuPont* factor considers the similarity or dissimilarity of established, likely-to-continue trade channels. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018); *DuPont*, 177 USPQ at 567. We compare the goods as they are identified in the involved application (i.e., distilled agave liquor and distilled blue agave liquor) and cited registrations (beers). *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3 (citing, inter alia, *Detroit Athletic Co.*, 128 USPQ2d at 1052).

The issue is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the source of the goods. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, *5 (TTAB 2020); *L'Oreal v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be "related in some manner and/or if the

circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

Evidence of relatedness may include excerpts from computer databases showing that the goods are used by the same purchasers; advertisements showing that the goods are advertised together or sold by the same manufacturer or dealer; and copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration. *In re Embiid*, 2021 USPQ2d 577, at *22-23 (TTAB 2021) (citing *Ox Paperboard*, 2020 USPQ2d 10878, at *5; and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”)).

The Examining Attorney contends that beer and distilled agave liquor are “highly related” because “[i]t is common for the same entity to offer both beer and distilled agave spirits,” and thus the goods “are of a kind that may emanate from a single source under a single mark.”¹¹ In support of these contentions, the Examining Attorney cites copies of 13 third-party webpages made of record in the November 7, 2021 Office action and January 8, 2023 denial of reconsideration showing various

¹¹ 8 TTABVUE 8.

third parties making, offering, and advertising for sale under the same mark beer and distilled agave liquor.¹² The following examples are illustrative:

- Maverick Whisky is a brewery and distillery in San Antonio, Texas, which makes distilled blue agave liquor and beer;¹³
- Red River Brewing Company & Distillery in Red River, New Mexico, makes distilled blue agave liquor and beer;¹⁴
- Round Barn in Baroda, Michigan, makes distilled agave liquor and beer;¹⁵
- 3 Rivers Brewing in Farmington, New Mexico, makes distilled agave liquor and beer;¹⁶
- The Washington Brewing Company in Washington, Pennsylvania, makes distilled blue agave liquor and beer;¹⁷
- Shelter Distilling in Mammoth Lakes, California, makes distilled blue agave liquor and beer;¹⁸ and
- Baston River, with multiple locations in Maine, makes distilled blue agave liquor and beer.¹⁹

We find this third-party webpage evidence showing the same mark used for both Applicant's goods and Registrant's goods is probative to demonstrate that the goods are related for likelihood of confusion purposes. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types

¹² 8 TTABVUE 8.

¹³ November 7, 2021 Office Action at 14, 18-19; January 9, 2023 Denial of Reconsideration at 36-37, 41 (maverickwhiskey.com).

¹⁴ November 7, 2021 Office Action at 25, 28-31 (redriverbrewing.com).

¹⁵ November 7, 2021 Office Action at 34, 35 (roundbarn.com).

¹⁶ January 8, 2023 Denial of Reconsideration at 4, 8 (threeriversbrewery.com).

¹⁷ January 8, 2023 Denial of Reconsideration at 10, 12 (thewashingtonbrewingcompany.com).

¹⁸ January 8, 2023 Denial of Reconsideration at 45-46, 48-49 (shelterdistilling.com).

¹⁹ January 8, 2023 Denial of Reconsideration at 51, 55 (bastonriver.com).

of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both.”); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from “several third-party car dealerships offering ‘tires’ for sale on their websites” was “evidence that consumers expect to find both ‘tires,’ . . . “and ‘automobiles’ . . . emanating from a common source.”).

In further support of the relationship between the goods, the Examining Attorney submitted the following five, use-based, subsisting, third-party registrations for marks identifying, inter alia, beer and distilled blue agave liquor:²⁰

- Registration No. 5745926 for the mark ;
- Registration No. 5971709 for the mark ;
- Registration No. 6269619 for the mark ;
- Registration No. 6647900 for the mark ; and
- Registration No. 5581159 for the mark LA CHALUPA.

These third-party registrations based on use in commerce that cover beer and distilled agave liquor serve to suggest that the listed goods are of a type that may

²⁰ June 10, 2022 Office Action at 51, 53, 81, 92, 98. We do not consider the 17 registrations that issued solely under Sections 44(e) or 66(a) of the Trademark Act, 15 U.S.C. §§ 1126(e), 1141f(a), that do not contain allegations of use in commerce (*id.* at 6-50, 56-80, 85-91, 95-97). *In re 1st USA Realty Pros. Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Albert Trostel*, 29 USPQ2d at 1786.

emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *8 (TTAB 2019); *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013).

Applicant does not challenge any of the Examining Attorney's evidence, but instead points to the decision in *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009), in support of its contention that there is no per se rule that alcoholic beverages are related – and, by implication, that beer and agave liquor are not related.²¹ However, in *White Rock*, the Board not only found insufficient support in the record for the examining attorney's argument that “energy vodka infused with caffeine” was related to “sparkling fruit wine, sparkling grape wine, sparkling wine, [and] wines,” but also found that the applicant's mark VOLTA was more dissimilar



from, than similar to, the registered mark . 92 USPQ2d at 1285. Unlike in *White Rock*, here the Examining Attorney's evidence of record supports a finding that beer and agave liquor emanate from common sources, under the same house marks or trademarks, and as discussed above we find the marks in this appeal similar in their entireties. Accordingly, while we recognize there is no per se rule that all alcoholic beverages are related, “[i]t has been said many times that each case must be decided on its own facts,” *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010), “and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*,

²¹ 6 TTABVUE 9.

475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). Here the Examining Attorney introduced sufficient evidence to support a finding of relatedness, and Applicant has not introduced any evidence to rebut that showing.

Finally, Applicant also contends that the identified goods themselves are different.²² But, as noted earlier, the issue “is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the **source** of these goods.” *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (emphasis added). All that is required is simply that the goods are related in some manner or the marketing therefor could give rise to the mistaken belief that they emanate from a common source. *See Coach Servs.*, 101 USPQ2d at 1722; *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

With regard to the similarity of the trade channels in which the goods are encountered and the types of purchasers, we must base our likelihood of confusion determination on the goods as they are identified in the application and registrations at issue. *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018), *aff'd mem.*, 778 F. App'x 962 (Fed. Cir. 2019). Neither the cited registrations nor the application contains any restrictions on the channels of trade or classes of purchasers for the respectively identified beer and distilled agave liquor.

²² 6 TTABVUE 9. Applicant's related assertion that its agave liquor and Registrant's beers “exist in different class[es],” *id.*, is not relevant. The classification of goods by the USPTO is a purely administrative determination. *Detroit Athletic*, 128 USPQ2d at 1051 (“Classification is solely for the ‘convenience of Patent and Trademark Office administration,’ and ‘is wholly irrelevant to the issue of registrability under section 1052(d).’”).

The same third-party webpages referenced above demonstrate that beer and distilled agave liquor may be encountered by the same classes of consumers under the same marks in at least two common trade channels – the websites and physical locations of breweries and distilleries, i.e., producers and sellers of beer and liquor. This evidence supports a finding, in line with the Examining Attorney’s argument, that these goods are offered in at least two common channels of trade, that is, the websites and physical locations operated by the third-party breweries and distilleries. *See also see also Majestic Distilling*, 65 USPQ2d at 1204 (malt liquor and tequila “similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers”); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1827-28 (TTAB 2015) (“[I]t is clear that beer and other alcoholic beverages . . . are sold to consumers in many of the same channels of trade, including retail outlets such as liquor stores, supermarkets, convenience stores, restaurants, and bars . . .”). Applicant offers no argument or evidence to the contrary.

In view of the evidence adduced by the Examining Attorney, we find that the second and third *DuPont* factors regarding the similarity of the goods and channels of trade weigh in favor of finding of a likelihood of confusion.

C. Purchasing Conditions and Consumer Sophistication

“The fourth *DuPont* factor . . . considers ‘[t]he conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing.’” *In re Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567). Purchaser

sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695. “[T]he applicable standard of care is that of the least sophisticated consumer.” *Stone Lion*, 110 USPQ2d at 1163.

Without citing to any evidence, Applicant contends that “the buyers of the respective goods . . . will be . . . sophisticated,” and “are well educated, and not likely to make such purchases on impulse.”²³ Applicant continues that it and Registrant “deal in respective goods that can be extremely expensive” and therefore “more care is taken and buyers are less likely to be confused as to source or affiliation.”²⁴ Applicant does not point to any evidence to support these statements, we find no such evidence to be of record, and we can make no assumptions in this regard based on the nature of the identified goods. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

There is nothing in the nature of Applicant’s or Registrant’s goods (none of which are limited as to their types, price points, or intended consumers) to suggest their purchasers are particularly sophisticated or careful. *See I-Coat Co.*, 126 USPQ2d at 1739. Because the respective identifications have no limitation on price point or purchasers, we must treat the goods as including inexpensive beers and agave liquor and therefore presume that purchasers for these goods include ordinary consumers

²³ 6 TTABVUE 10.

²⁴ 6 TTABVUE 11.

who may buy inexpensive beer and agave liquor on impulse. *In re Bay State Brewing Co.*, 117 USPQ2d at 1960 n.4 (citing *Stone Lion*, 110 USPQ2d at 1163-64; *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992)). Accordingly, the fourth *DuPont* factor is neutral.

D. Fame and Lack of Actual or Potential Confusion

Applicant makes additional arguments in its brief why it believes confusion is not likely. However, these arguments either lack the necessary evidentiary support or are not persuasive. For example, Applicant argues that “there is no evidence that the cited [marks] are famous,” “[t]here has been no documented evidence that shows that any consumers have confused the respective marks in commerce,” and “any potential confusion between the respective marks would be de minimis.”²⁵

No evidence regarding the fame of Registrant’s marks has been made of record and it is not necessary that a mark be famous to find a likelihood of confusion. *See DuPont*, 177 USPQ at 567. In an ex parte appeal such as this, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited marks in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). Moreover, while evidence showing that the senior marks are famous would suggest a finding that confusion is likely, the lack of such evidence does not indicate that confusion is unlikely. *Majestic Distilling*, 65 USPQ2d at 1205. The fifth *DuPont* factor is neutral.

²⁵ 6 TTABVUE 11, 12.

Nor is the absence of any actual confusion relevant. First, the involved application is not based on use in commerce so it is not clear that there has been any meaningful opportunity for any confusion to occur. *See In re Embiid*, 2021 USPQ2d 577, at *39; *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Second, we also do not know whether Registrant is aware of any instances of actual confusion. *In re Guild Mort.*, 2020 USPQ2d 10279, at *7. (“[I]n this ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion. We therefore are getting only half the story.”). Third, although a showing of actual confusion would be highly probative of a likelihood of confusion, the opposite is not true. The lack of evidence of actual confusion carries little weight, especially in an ex parte context. *Majestic Distilling*, 65 USPQ2d at 1205. Accordingly, the seventh, eighth, and twelfth *DuPont* factors are neutral as well.

E. Conclusion as to Likelihood of Confusion

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023) (“[I]t is important . . . that the Board . . . weigh the *DuPont* factors used in its analysis and explain the results of that weighing.”), we find confusion is likely between Applicant’s mark DESPERADOS for “distilled agave liquor; distilled blue agave liquor” and the cited DESPERADOS bottle-position and coin marks for “beers.” The marks are similar in appearance, sound, connotation, and commercial impression; and the goods are related and travel in at least one of the same trade

channels to ordinary consumers who exercise no more than an ordinary degree of care. All other factors are neutral on this record.

II. Decision

The Section 2(d) refusal to register Applicant's mark DESPERADOS is affirmed.